



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: PA/05393/2019

THE IMMIGRATION ACTS

**Heard at Field House
On 14 October 2021**

**Decision & Reasons Promulgated
On 15 November 2021**

Before

**UPPER TRIBUNAL JUDGE RIMINGTON
UPPER TRIBUNAL JUDGE NORTON-TAYLOR**

Between

**RN
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure
(Upper Tribunal) Rules 2008**

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Representation:

For the Appellant: Ms K Wass, Counsel, instructed by David Benson Solicitors
For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of First-tier Tribunal Judge J C Hamilton (“the judge”), promulgated on 17 October 2019, by which he dismissed the Appellant’s appeal against the Respondent’s refusal of his protection and human rights claims. We have arrived at this stage in proceedings following a remittal by consent from the Court of Appeal in respect of which a previous decision of the Upper Tribunal concluding that the judge had committed no errors of law was set aside by an order sealed on 12 February 2021. We need not rehearse the details of proceedings in the Court of Appeal. Suffice it to say that the parties are agreed, in line with our view, that it is now for us to determine whether the judge erred in law and, if he did, whether his decision should be set aside. It is also agreed that the Appellant’s challenge is premised on the grounds of appeal accompanying the application made to the Upper Tribunal for permission to appeal.
2. The Appellant is a citizen of Sri Lanka who arrived in the United Kingdom in December 2001. An initial asylum claim was refused and an appeal against that decision was dismissed. In so doing, the Adjudicator (as they were then called) accepted that the Appellant had been forced to work for the LTTE and that he had been detained by the Sri Lankan Army in the north of the country, having subsequently secured his release through the payment of a bribe. The Adjudicator accepted that the Appellant had been tortured in detention and that there were a number of scars on his body as a consequence thereof. It was not accepted that the loss of part of a finger was due to a gunshot injury. Ultimately the Adjudicator concluded that the Appellant was not at risk if returned to Colombo.
3. Following dismissal of his original appeal the Appellant remained in this country and made further submissions on at least two occasions thereafter. Eventually a set of submissions based largely on claimed *sur place* activities in the United Kingdom on behalf of pro-Tamil organisations resulted in a refusal of what was deemed to constitute a fresh claim, which in turn attracted a right of appeal. That decision, dated 8 May 2019, led to the appeal before the judge. The initial decision of the Upper Tribunal dismissing the Appellant’s appeal against the judge’s decision has been set aside and we need not address it here.
4. By way of a summary, the judge arrived at the following key conclusions:
 - (a) That the findings of the Adjudicator in 2002 represented the starting point for the claimed past events in Sri Lanka;
 - (b) The Appellant had as a matter of fact undertaken a number of activities on behalf of the Transitional Government of Tamil Eelam (“TGTE”) between 2009 and the time of the hearing in September

2019. His activities had included attendance at demonstrations and community events;

- (c) The activities did not demonstrate that the Appellant was a “leader or a senior figure in the TGTE or the Tamil diaspora”;
- (d) The Appellant’s activities had not been motivated by a genuine political belief;
- (e) The scarring did not represent a material risk factor on return;
- (f) The Appellant did have some mental health difficulties but these were not significant;
- (g) If the Appellant were to be questioned by the Sri Lankan authorities he could be expected to withhold disclosure of his *sur place* activities on the basis that they had not been genuinely undertaken;
- (h) The Appellant was not at risk on return.

The grounds of appeal

- 5. The grounds of appeal essentially raise three points. Firstly the judge failed to properly consider the evidence before him, including a Rule 35 medical report and documentary evidence of his *sur place* activities. Secondly, the judge had acted irrationally by concluding that the Appellant should lie about *sur place* activities because they were not motivated by a genuine political belief and that he failed to approach the issue of risk with reference to the perception of the Sri Lankan authorities to an individual’s profile. Thirdly, the judge had failed to undertake a cumulative assessment of the factors relating to risk on return including both the *sur place* activities and history of detention in Sri Lanka.
- 6. Permission to appeal was granted on all grounds by the First-tier Tribunal.
- 7. In advance of the hearing both parties provided skeleton arguments.

The hearing

- 8. In addition to relying on the skeleton arguments, we received supplementary oral submissions at the hearing. The points made by the representatives are subsumed within our analysis and conclusions, below.

Analysis and conclusions

9. We have concluded that the judge did err in law and that as a result his decision should be set aside in its entirety.
10. The judge was wrong to have believed that the Rule 35 report was not in evidence before her: it was in fact contained within the Respondent's appeal bundle. However, having regard to that report and the evidence as a whole, we do not see that this oversight constituted an error which could have had a material bearing on the outcome. Much, if not quite all, of the Appellant's account of events in Sri Lanka had been accepted by the Adjudicator in 2002. In our view, on the facts of this case, the Rule 35 report added nothing of material importance to the judge's assessment of that evidence of the Appellant's case.
11. However, there is we conclude an error in respect of the judge's consideration of the evidence of *sur place* activities. At [59] of his decision, the judge sets out a number of events and demonstrations which, supported by photographic evidence, he accepted were attended by the Appellant. In terms of the period 2009 to 2014, the stated events were few in number. Notwithstanding this, the judge was clearly wrong to state in the following paragraph that there was "no photographic or other cogent evidence" of activity during this period. In addition, there appears to have been no consideration of the fact that the Appellant had been detained under immigration powers for a period in 2013, thus precluding him from engaging in any activities. These matters are also to be seen in light of the final sentence at [60] in which the judge states that he took into account the Appellant's evidence that the recorded events were "just samples of his wider activities". There does not appear to have been a consideration of, or specific findings in relation to, other evidence of activities undertaken (for example, the Appellant's witness statement and information contained in letters from the TGTE. The absence of live evidence from the authors of these letters did not result in no weight being placed upon the evidence, albeit such weight was limited: see [65]). We view these difficulties in the judge's decision in the context of his acceptance that the Appellant had in fact been engaged in activities and that there was a good deal of supporting evidence in respect of activities undertaken since 2018. In our view the totality of the evidence relating to *sur place* activities was not properly factored into the assessment of risk on return - and in part the judge apparently proceeded on the basis of mistake of fact over the long term engagement of the appellant in *sur place* activity.
12. We turn to the judge's conclusion that the Appellant could be expected to deliberately withhold information about his activities if questioned by the Sri Lankan authorities, as set out at [93] to [96]. This constitutes an error in approach for the following reasons.
13. Firstly, the judge accepted that the Appellant had undertaken a large number of activities on behalf of the TGTE including, on at least one occasion, having acted as a steward at a demonstration, wearing a high visibility yellow jacket on which was emblazoned a pro-Tamil slogan. As

was made clear in paragraph 356(7)(a) of GJ (post-civil war: returnees) Sri Lanka CG [2013] UKUT 319 (IAC) (the country guidance case then applicable), the issue of risk on return must be assessed through the lens of the perception of the authorities as to whether an individual was of sufficient interest to warrant detention. Whether or not *the judge* believed the Appellant to hold a particularly important role in the diaspora was not the decisive question.

14. Secondly, the perception of the Sri Lankan authorities had to be assessed on the basis of information which they would reasonably likely have come to obtain through what GJ described as the “sophisticated intelligence” gathering operation in countries such as the United Kingdom. This included surveillance and the use of informants. In addition, GJ concluded that those it was proposed to return to Sri Lanka would, if they did not possess a valid passport, be interviewed at the Sri Lankan High Commission prior to return: see paragraph 352. The surveillance and questions put at such an interview (and whether or not additional questions were asked on return) would allow the authorities to “know all they needed to” in respect of an individual. The genuineness of the individual’s motivation for engaging in any *sur place* activities was a matter for the authorities to assess in light of the information acquired. That information would be based on facts known (or suspected), including actual participation in events, the nature of the events, organisations with which the individual had connections, the duration of activities, and suchlike.
15. Thirdly, the judge’s fundamental error of approach is to have first concluded that the Sri Lankan authorities would not have regarded the Appellant’s activities as sufficiently significant (applying a criterion of leadership or senior position in the TGTE as a benchmark), then find that the activities were not genuinely undertaken, and then conclude that the Appellant could lie about his activities if questioned. Requiring the Appellant to lie in effect bypassed the stage of the risk assessment in which the Sri Lankan authorities would be in a position to gauge their *own* perception of the Appellant. This is because, on the judge’s analysis, he would have deliberately withheld information on the extent of his acts/activities which may have informed the authorities’ view of him. Further, the judge’s finding effectively placed the Appellant in the invidious position of potentially being, as Ms Wass put it in submissions, “caught in a lie”. In other words, the authorities may have already obtained evidence on his activities, but when questions were put to him and he deliberately withheld information (effectively denying participation), his dissembling would be uncovered. This of itself could potentially increase any adverse attention in him on the part of the authorities. In our judgment, the steps adopted by the judge in his risk assessment are flawed. In short terms, they fail to apply what was then the applicable country guidance in which GJ.
16. We make an additional observation at this stage. We have already referred to the judge stating that the necessary profile to engage a risk on

return was that of “leader” or a “senior position” within the TGTE or the Tamil diaspora. That is not in fact the terminology employed in GJ. Whilst not expressly raised in the grounds of appeal, it gives rise to a concern on our part that the judge had applied a higher profile threshold, as it were, than should have been the case.

17. We turn to the third issue raised in the grounds of appeal, acknowledging that it in part flows on from what we have just said. In our view, there has not been an adequate assessment of the risk potentially caused by a combination of the Appellant’s *sur place* activities and his accepted history in Sri Lanka. This is not a case in which the Appellant has asserted existence of an arrest warrant against him and it is clear that the history in Sri Lanka would not of itself have been sufficient to demonstrate risk. However, evidence considered by the Tribunal in GJ (see paragraph 125) indicated that release by payment of a bribe would not necessarily result in the expunging of any record of the detention. The judge failed to deal with this issue when considering risk on return. He failed to consider whether any questions would be put to the Appellant relating to his past and/or whether any checks would be made to see whether there was an adverse history in that country. If information of previous detention did come to light, it would have been capable of informing the authorities’ overall perception of him. Thus, a relevant matter was not taken into account.
18. For the reasons set out above, we conclude that the judge’s decision materially erred in law, is unsustainable and must be set aside.
19. We have carefully considered whether any of his findings can properly be preserved (leaving aside the findings made by the Adjudicator in 2002, which represent the starting point for events occurring in Sri Lanka, in line with the well-known Devaseelan principles). We acknowledge that the judge made findings on aspects of the evidence relating to the genuineness of the Appellant’s motivation: see, for example, [72] to [74] of the First-tier Tribunal decision; yet an aspect of our analysis, above, does engage the judge’s overall credibility assessment. Owing therefore to the fundamental nature of the findings to be made, the fact that the Appellant has already provided evidence of further activities undertaken in this country since the judge’s decision, and the existence of the new country guidance set out in KK and RS (Sur place activities: risk) Sri Lanka CG [2021] UKUT 130 (IAC), it is in all the circumstances not appropriate for us to preserve any findings.

Disposal

20. We have decided that this appeal should be remitted to the First-tier Tribunal for a complete rehearing. The findings of the Adjudicator in 2002 shall remain the starting point in respect of events occurring in Sri Lanka, but no other findings of fact made by the judge shall be preserved. The evidence presented at the remitted hearing will be the subject of

assessment and findings made will then be applied to the country guidance set out in KK and RS.

Anonymity

21. An anonymity direction is made.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law and its decision is set aside.

The appeal is remitted to the First-tier Tribunal.

Directions to the First-tier Tribunal

- (1) This appeal is remitted to the First-tier Tribunal for a rehearing;
- (2) The remitted appeal shall be conducted in light of this error of law decision and by a judge other than First-tier Tribunal Judge J C Hamilton;
- (3) The First-tier Tribunal shall issue any further case management directions it deems appropriate.

Signed H Norton-Taylor

Date: 19 October 2021

Upper Tribunal Judge Norton-Taylor